

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

—
No. 8775
—

218

CITIZENS LOAN AND TRUST COMPANY, Admr.
d.b.n., of Estate of JOSEPH KELLY
KERR, Deceased, *Appellant*

v.

THE UNITED STATES OF AMERICA, FRANK T.
HINES, Admr. of Veterans Affairs, LINDSEY C.
WARREN, Comptroller General of the United
States, *Appellees*

—
APPEAL FROM ORDERS OF UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
—

CAMDEN R. McATEE
1021 Tower Building
Washington 5, D. C.
Attorney for Appellant

Of Counsel:

JAMES W. BLAIR
Bloomington, Indiana
MASON, SPALDING & McATEE

INDEX.

	PAGE
Jurisdictional Statement	1
Statement of the case	2
Points of Appellant relied on as Errors.....	6
Summary of argument	7
Argument	8
Conclusion	16

CASES.

Adams v. United States, 317 U. S. 269, 272.....	10
Appleton v. Smith, 1 Dill. 202, Fed. Case No. 498.....	13
Brown v. United States, 65 F. (2) 65.....	8
Commercial Union v. Anglo-South American Bank, 10 F. (2) 937	13
Condon v. Mallon, 58 App. D. C. 371; 30 F. (2) 995.....	8
Covington & C. Bridge Co. v. Hager, 203 U. S. 109....	15
Crouch v. United States, 266 U. S. 180.....	9
Frazier v. Kutz, App. D. C. not yet reported; 139 F. (2) 380	8
Fuller v. Aylesworth, 75 F. 694; 159 U. S. 250.....	10, 15
Hamilton v. Brown, 161 U. S. 256, 267.....	8
Hines, Admr. v. United States, <i>ex rel.</i> , 70 App. D. C. 206, 106 F. (2) 85.....	5, 8, 15, 17
Kendall v. United States, 12 Pet. 524, 624.....	9, 14
Kentucky v. Dennison, 24 How. 97.....	9
Knapp v. Lake Shore & M. S. Ry. Co., 197 U. S. 536....	15
Labette County Commrs. v. United States, <i>ex rel.</i> Moul- ton, 112 U. S. 217.....	11
Law v. United States, 266 U. S. 494	9, 15
Lynch v. United States, 292 U. S. 571, 587	8
Marbury v. Madison, 1 Cranch 137	15

II.

	PAGE
McClung v. Silverman, 6 Wheat 601	9
McIntire v. Wood, 7 Cranch 506	9
Riggs v. Johnson County, 6 Wall 166, 198	10, 15
Robertson v. Railroad Labor Board, 268 U. S. 616.....	15
Sibbold v. United States, 1 Pet. 488, 492	8
Simmons v. Grier Bros. Co., 258 U. S. 82, 91.....	8
Singleton v. Cheek, 284 U. S. 493	8
Southard v. Russell, 16 How. 547, 570.....	8
Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 425	8
Title Guaranty & S. Co. v. Nichols, 224 U. S. 346.....	8
Transcontinental & W. Air v. Farley, 71 F. (2) 288, Cert. den. 55 S. C. 119	15
United States v. Citizens Loan and T. Co., Adm., 316 U. S. 209	3
United States v. Fennell, 67 F. (2) 768	8
United States Fidelity & Guaranty Co. v. Ft. Misery H. District, 22 F. (2) 369, 372	10
United States v. Johnson County, 6 Wall (73 U. S.) 166	8
United States v. McVeigh, 214 U. S. 124	14
United States v. Pfitsch, 256 U. S. 547	9
United States v. Schurz, 12 Otto (102 U. S.), 378, 478..	15, 16
Wayman v. Southard, 10 Wheat. 56	9
West v. Hitchcock, 19 App. D. C. 333, 346.....	14, 17

STATUTES

Act of Congress, March 3, 1863, 12 St. 762 Ch. 51, 1,)	
Title 11, Sec. 301, D. C. Code .	)
Feb. 9, 1893, 27 St. Ch. 74, 434	)
Title 11, 201, Idem.	) 2

III.

	PAGE
March 3, 1901, 31 St. 1190, Ch. 854, 21)	
Title 11, 201, Idem.)	2
June 7, 1924, 43 St. 612, Ch. 320,)	
19)	
W. W. V. A. 303 as amended.	2, 3
W. W. V. A. 16, 46 St. 992, Ch. 849, 3.	4
W. W. V. A. 19, 43 St. 612, c. 320, 19, 38 U. S. C. A.	
445	2, 9, 14
Act of March 3, 1933, 47 St. 1516, Title II, c. 212, 31 U. S.	
C. A. 227.	4
Act Sept. 24, 1787, 1 St. 73, 81, Ch. 20.	10
262 Judicial Code, 28 U. S. C. A. 377.	10, 14
Act of March 3, 1901, 31 St. 1199, c. 854, 41)	
March 3, 1911, 36 St. 1162, c. 231, 289)	14
11 D. C. Code 305)	



United States Court of Appeals

OF THE DISTRICT OF COLUMBIA

No. 8775

CITIZENS LOAN AND TRUST CO., Admr. *d.b.n.*, of
Estate of JOSEPH KELLY KERR,
Deceased, *Appellant*

v.

THE UNITED STATES OF AMERICA, FRANK T.
HINES, Admr. of Veterans Affairs, LINDSEY C.
WARREN, Comptroller General of the United
States, *Appellees*

BRIEF FOR APPELLANT.

The appendix herein is made by agreement of counsel. References herein are to the Appendix as (A.); to the Record as (R.).

Jurisdiction.

This appeal is from final orders of the District Court below, that sustain motions of the respondent-officers (A. 17, R. 31, 32), for the vacation and discharge of an alternative order (A. 13, R. 25, 26), previously granted against appellee respondent-officers of the United States upon motion below of appellant (A. 3, 10, R. 11, 21), and sustain the motion of the United States (A. 15, R. 28, 29, 30), for dismissal of the action against the United States allegedly arising because of the previous grant of said

alternative order against said respondent-officers (A. 13, R. 25, 26). The several motions were filed on the return day instead of responses to the alternative order.

Said final orders were entered January 18, 1944, and notice of appeal was filed and perfected within three months thereafter pursuant to the rule of Court.

The amount in controversy is in excess of \$3,000.

The jurisdiction of this Court is invoked pursuant to Acts of Congress as amended, originally enacted March 3, 1863. (12 St. 762 Ch. 51, 1; Title 11, Sec. 301, D. C. Code; Feb. 9, 1893; 27 St. 434 Ch. 74; Title 11, 201 *Idem.* March 3, 1901; 31 St. 1190, Ch. 854, 21; Title 11, 201 *Idem.*; June 7, 1924, 43 St. 612, Ch. 320, 19.)

Statement.

On October 30, 1943, the District Court below granted the amended motion of appellant, as plaintiff in the action below, and issued its alternative order which required the appellees, Administrator of Veterans Affairs and the Comptroller General of the United States, as respondents, on or before November 11, 1943, to show administrative payment to satisfy the judgment rendered in the action in favor of appellant and in full force against the United States, or alternatively to show sufficient cause for its non-payment.

Said unsatisfied judgment was and is the judicial determination and liquidation in the action below, duly authorized and instituted pursuant to a law of the United States (W.W.V.A., Section 19 as amended, 43 St. 1302, Ch. 553, 2; 38 U.S.C. 445) of the statutory and contractual claim of the estate of the insured veteran, Joseph Kelly Kerr, who died November 8, 1919, (W.W.V.A. as amended, Sec. 303; 43 St. 1310, Ch. 553, 14) to the present value of the

contractual monthly installments of a yearly renewable term insurance contract in the principal sum of \$10,000, which installments would accrue after the death in 1924 of the surviving designated beneficiary within the contract term. Said judgment below duly entered June 30, 1943, as effective of and after April 5, 1940, pursuant to mandate of the Supreme Court of the United States (*United States v. C. L. & T. Co. Adm.*, 316 U. S. 209), was and is for the principal sum of \$8,227.50 without interest, and was and is subject to payment from its proceeds as a charge thereon of \$822.75 as the statutory allowable fee to plaintiff attorney of record. This attorney fee, unpaid on October 30, 1943, was subsequently paid upon voucher of the Veterans Administration approved by the Comptroller General (Vide Ex. 1 Appellant Brief), and thereby the judgment remains unsatisfied in the balance of \$7,404.75. The several judgments, the motions to vacate or stay the final judgment as made after its entry, and the order overruling same are set forth in the affidavit for issue of the alternative order (A. 11, R. 22, 23, 24).

Said judgment of June 30, 1943, is a reentry of a modified judgment below previously entered on January 9, 1941, and thereafter reversed by this Court in Appeal of Elizabeth Kerr, Admx. v. United States, (74 D. C. App. 244, 122 F. (2) 638), and said reentry is the result of a petition for certiorari and reversal of this Court by the Supreme Court (*supra*).

Said judgment is responsive to the provisions of W. W. V. A., Sec. 303 as amended March 5, 1925, to wit:

“* * * if the designated beneficiary * * * survives the insured and dies prior to receiving all of the 240 installments, or such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment

made under any existing award; * * * Provided further that in cases where the estate of an insured would escheat under the laws of the place of his residence the insurance shall not be paid to the estate but shall escheat to the United States and be credited to the military and naval insurance appropriation." * * *

As in the proceedings below prior to the judgment entries, the affirmative defense of escheat was not made before entry of the judgment of June 30, 1943, subsequently by objection tacitly overruled by the entry, and, thereafter, by motion to vacate said judgment, filed on July 3, 1943, and by alternative motion to stay its execution, filed on September 17, 1943, counsel for the United States sought judicially to require plaintiff to satisfy the Court below that, upon payment, the judgment proceeds would not escheat under the laws of the residence of the insured, as a condition precedent to payment. On December 7, 1943, the Court below overruled these motions and no appeal was taken. Thus every provision of the statute was enveloped into the finality of the judgment as forthwith payable. The procedure for payment is provided in W. W. V. A. Section 16 as amended (46 St. 992, c. 849, 3) which makes available all sums appropriated and all premiums collected upon term insurance for payment of liabilities of the United States upon yearly renewable term insurance contracts including such liabilities as shall have been reduced to judgment in the District Courts or courts of the District of Columbia, and provides that payments from said appropriations shall be made upon and in accord with awards of the Administrator of Veteran Affairs.

Before application by appellant below for the alternative order, the Department of Justice had certified said judgment for administrative payment to the Veterans Administration by award duly to be made, and subject only to determination by the Controller General (Act of March 3,

1933, 47 St. 1516, Title II c. 212; 31 U. S. C. 227) of any indebtedness of claimant to the United States, for adjustment by consent of claimant or withholding thereof pending immediate prosecution in further legal proceedings of such claim against plaintiff, and refund with interest of any excess upon termination of the litigation. (Vide *Hines, Adm. v. United States*, 70 App. D. C. 206, 106 F. (2) 85, dealing with these procedures.) As stated, upon said certification payment has been made of the attorney fee of \$822.75, but appellant is not advised of any indebtedness claimed by the United States, or of institution of any proceeding for its collection.

The alternative order recites appellant originally moved for grant of same against the United States (A. 3, R. 11) and, upon objection by the United States that the order, if any, should issue against its officers not against the sovereign, duly amended the motion (A. 10, R. 21) to obtain the order against its officers as respondents. The supplemental affidavit filed in support of the amended motion (A. 11, R. 22, 23, 24) recites, instead of award by the Veterans Administrator, for approval for payment by the Comptroller General to the extent of its excess over alleged indebtedness to the United States, that the Veterans Administrator obtained and relies upon an advance decision of the Comptroller General that payment of the judgment, excepting the attorney fee, should not be made until or unless appellant submitted convincing evidence to the Veterans Administrator that its proceeds upon payment would not escheat under the laws of the residence of the insured, and the affidavit alleges said advance decision exceeds the powers of the Comptroller General in that same operates to reject, review and revise the final judicial ruling below that said judgment was neither subject to be vacated nor stayed from payment until or unless appellant showed escheat would not follow upon its payment.

Upon the day certain designated in said alternative order, instead of a showing of payment or responses to justify non-payment, the presiding Motions Justice (Mr. Justice Letts having succeeded Mr. Justice McGuire, who originally issued the alternative order) received motions from the respondent-officers to vacate and discharge said alternative order, and from the United States to dismiss the action against the United States allegedly thereby instituted, and after hearing, on January 18, 1944, sustained said motions and entered orders vacating said order against the respondent-officers, and dismissing the action against the United States (A. 18, 19, R. 33, 34, 35). On January 22, 1944, Mr. Justice Letts overruled a motion for rehearing prematurely filed before entry of the above orders, and the present appeal followed in due course.

In the absence of opinion upon the rulings below the allegations in the motions are to be considered as to their merits.

Points Relied on by Appellant.

(A. 21, R. 38, 39.)

1. The Court below erred in considering and granting the motion to dismiss the order of October 30, 1943, filed by defendant, United States of America, and in thereby upholding any of its following contentions, that the United States is a party to said order, or that the order erroneously injects a mandatory action into an action for insurance benefits, or that the United States has not consented to be sued except under Section 19 of the World War Veterans Act, or to any joinder of its officers, or that the order joins its officers with the United States, or that said officers must be sued in a separate mandatory action.

2. The Court below erred in considering and granting the motions to vacate the order of October 30, 1943, filed by the respondents, the Comptroller General and the Veterans Administrator, and in thereby upholding any of their following contentions: That the order joins said officers with the United States in a mandatory proceeding in an action arising under Section 19 of the World War Veterans Act; or that thereby misjoinder of parties and causes of action results; or that the right of claimant constitutes a separate and distinct cause of action against said officers; or that said officers are entitled to sixty days in which to answer.

3. The Court below erred in considering and granting the said motions to dismiss and vacate in its refusal thereby to rule:

(a) The order of October 30, 1943, is proper ancillary exercise of the judicial power reposed in jurisdiction of the original action to give its judgment effect.

(b) Said order constitutes the law of the case to be followed, and not revoked by another judge.

(c) Said order is to be admeasured by the merit of the required response, and not by collateral attack.

(d) The contentions presented by the said motions are not substantial.

Summary of Argument.

The argument for appellant is precisely summarized in Point 3 *supra*, to which reference is made as embodying the substance of Points 1 and 2.

ARGUMENT.

(a) The order of October 30, 1943, is proper ancillary exercise of the judicial power reposed in jurisdiction of the original action to give its judgment effect.

That the judgment below is final and in full force and effect, is certified to the proper agency for satisfaction by, payment, and is unpaid, are facts fully admitted. (A. 15, R. 28.) ⁽¹⁾ The resulting propriety of enforcing the judgment by further proceedings in the same action is precisely settled in *United States v. Johnson County*, 6 Wall. (73 U. S.) 166, as follows:

¹ The irrelevancy of administrative assertion that claimant must overcome the possibility of escheat prior to payment, after final judicial determination to the contrary and certification of the judgment for satisfaction, as shown in the supplemental affidavit upon the amended motion, apparently impressed Mr. Justice McGuire, who amended the tendered order (A. 13, R. 25, 26) to require cause for non-payment forthwith to be shown; in which situation, the alternative implication remained that discharge of the rule would follow if the judgment instead was shown as satisfied.

Parenthetically, the motions to vacate or stay the judgment until or unless claimant affirmatively showed non-escheat upon its payment were overruled in recognition of three settled principles. First, escheat, being never presumed (*Hamilton v. Brown*, 161 U. S. 256, 267; *Frazier v. Kutz*, 139 F. (2) 380; App. D. C. not yet reported) because, until rebutted by sufficient evidence, the legal presumption prevails that, upon death, a deceased is survived by heirs and next of kin, it follows the statutory proviso is "a defense, or more accurately a limitation or condition subsequent inherent in the obligation," which must be pleaded and affirmatively established against claimant. (*Brown v. United States*, 65 F. (2) 65; *United States v. Fennell*, 67 F. (2) 768) and which claimant need not negative in his complaint (*Title Guaranty & S. Co. v. Nichols*, 224 U. S. 346). Second, a previously available but omitted defense cannot arise to impugn the judgment (*Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399, 425). Third, except by permission of the Supreme Court, here not obtained, the judgment, which its mandate prescribes for entry is not subject to any intermeddling by the Court below. (*Sibbold v. United States*, 1 Pet. 488, 492; *Southard v. Russell*, 16 How. 547, 570; *Simmons v. Grier Bros. Co.*, 258 U. S. 82, 91).

As *W. W. V. A.*, Section 5 (48 St. Title 1, c. 3, 9, 38 U. S. C. A. 705), authorizing administrative decisions, does not apply to war risk insurance (*Lynch v. United States*, 292 U. S. 571, 587; *Hines Admr. v. United States*, *supra*), and as *Singleton v. Cheek*, 284 U. S. 493, and *Condon v. Mallon*, 58 App. D. C. 371; 30 F. (2) 995, conclusively decide the interests of the distributees vest in the insurance proceeds on the death of insured on November 8, 1919, and not subsequently, and, as the Court below has excluded the possibility of escheat, appellant is further justified in disregarding administrative decisions that insured had no competent distributees on a later date.

"Regularity of the proceedings in the primary suit are not open to inquiry, and it is conceded that the judgment was in regular form; and if so, the power of the Circuit Court to issue final process, agreeably to the principles and usages of law, to enforce the judgment, is undeniable. *Wayman v. Southard*, 10 Wheat 56.

"When issued by a federal court, the writ of mandamus is never a prerogative writ (*Kentucky v. Dennison*, 24 How. 97). Outside of this district, no circuit court can issue it at all in the exercise of original jurisdiction.

"Express determination of this court is, that it can only be issued by those (Circuit) courts in cases where the jurisdiction already exists, and not where it is to be acquired by means of the writ. (*Kendall v. United States*, 12 Pet. 615; *McClung v. Silverman*, 6 Wheat 601; *McIntire v. Wood*, 7 Cranch 506.)

"Where such exigency arises they may issue it, but when so employed, it is neither a prerogative writ nor a new suit, in the jurisdictional sense. On the contrary, it is a proceeding ancillary to the judgment, which gives the jurisdiction, and when issued, becomes a substitute for the ordinary process of execution to enforce the payment of same, as provided in the contract (*Kentucky v. Dennison*, *supra*)."

The original and exclusive jurisdiction of this action upon an insurance contract in the Court below, conferred by Section 19 as amended of the W. W. V. A., (43 St. 612, Ch. 320, 19, 38 U. S. C. A. 445), is precisely declared in *United States v. Pfitsch*, 256 U. S. 547. In *Law v. United States*, 266 U. S. 494, of said original and exclusive jurisdiction, it is further ruled:

"The jurisdiction possessed was that to be exercised in accordance with the usual procedure of the court in actions at law for money compensation. *Crouch v. United States*, 266 U. S. 180; *United States v. Pfitsch*, 256 U. S. 547."

The propriety of ancillary mandatory proceedings in the same action to enforce a money judgment for insurance pro-

ceeds against the United States, is then to be measured by the jurisdiction of a District Court to enforce at law a judgment for money compensation. In *Fuller v. Aylesworth*, 75 Fed. 694 (affirmed with costs, 159 U. S. 250, and recently explained and approved in *United States F. & G. Co. v. Ft. Misery H. District*, 22 F. (2) 369, 372 (C. C. A.—9)), Judge Taft reviewed constructions of the Judiciary Act involving the lack of jurisdiction in circuit courts of the United States (now district courts) to consider or decide a suit for a mandamus to compel the discharge of a statutory or other duty except for purposes of enforcing their judgments. Holding that limitations upon the enforcement of a judgment do not detract from its character as a judgment for the recovery of money, the ancillary right to provide mandatory directions in the judgment for its enforcement is upheld as follows:

“It follows that the writ of mandamus in the circuit courts is never an independent suit, as it is in many states and in England, but it is only a proceeding ancillary to the judgment which gives the jurisdiction, and when issued becomes a substitute for the ordinary process of execution to enforce payment of the same as provided in the contract. *Riggs v. Johnson Co.*, 6 Wall 166, 198.”

“The result is that in the circuit courts of the United States there must be a judgment for the recovery of money before there can be a mandamus to levy a tax to pay it, and that the mandamus is only a form of executing the judgment.”

Recently, adopting the words of Section 262 of the Judicial Code, in *Adams v. United States*, 317 U. S. 269, 272, the principle is again emphasized:

“Uninterruptedly from the first Judiciary Act (14 of the Act of September 24, 1787, 1 St. 73, 81 Ch. 20) to the present day (262 of the Judicial Code, 28 U. S. C. A. 377), the courts of the United States have had powers of an auxiliary nature—to issue all writs not

specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.”

These precedents effectively establish:

The District Court below, as a court of the United States, has powers of an auxiliary nature to issue all writs necessary to exercise of its jurisdiction, and agreeable to the usages and principles of law.

The judgment below is jurisdictionally for the recovery of money by the usual procedure of the court in actions at law for money compensation notwithstanding said judgment is against the sovereign.

A mandatory proceeding by the District Court, in the same action, to enforce its money judgment against the United States, is no independent action, and is only a necessary substitute for the ordinary process of execution for enforcement of a judgment.

These precedents effectively dissipate the contentions of the motions to vacate and dismiss that the mandatory ancillary proceeding is an additional cause of action not consented to by the sovereign, or involves either a misjoinder or parties or causes of action.

These conclusions are precisely upheld in *Labette County Commissioners v. United States, ex rel. Moulton*, 112 U. S. 217, where Moulton, upon his information, obtained an alternative writ in a federal district court against the Commissioners, Clerk and Treasurer of a county requiring them to levy taxes in order to satisfy its judgment in the same action in his favor against a township within said county, and by joint and several demurrer the respondents relied *inter alia*, on lack of jurisdiction, and improper joinder of parties and causes of action:

“It is quite true, as it is familiar, that there is no original jurisdiction in the circuit courts in *mandamus*, and that the writ issues out of them only in aid of a jurisdiction previously acquired, and is justified in such cases as the present as the only means of executing their judgments. But it does not follow, because the jurisdiction in *mandamus* is ancillary merely, that it cannot be exercised over persons not parties to the judgment sought to be enforced. * * * The question is, whether the respondents, to whom the writ is addressed, have the legal duty to perform which is required of them, and whether the relator has a legal right to its performance from them, by virtue of the judgment he has already obtained. If so, then they are, as here, the legal representatives of the defendant in that judgment, as being the parties on whom the law has cast the duty of providing for its satisfaction. They are not strangers to it, as being new parties on whom an original obligation is sought to be charged, but are bound by it, as it stands, without the right to question it, and under a legal duty to take those steps which the law has prescribed as the only mode of providing means for its payment.”

“The relator is entitled to an effective writ, and he can have it only on the terms of joining in its commands all those whose co-operation is by law required, even though it be by separate and successive steps, in the performance of those official duties, which is necessary to secure to him his legal right. Otherwise the whole proceeding is liable to be rendered nugatory and abortive.”

(b) Said order constitutes the law of the case to be followed, and not revoked by another judge.

The above principles, so effectively applied by the first Motions Justice below in grant of the alternative order, are as effectively disregarded by the second Motions Justice below in subsequently vacating and dismissing the alternative order. That the principles applied in grant of the order thereafter constitute the law of the case, to be

accepted and not disregarded by the second Justice, is submitted entirely sustained by precedents. In *Commercial Union v. Anglo-South American Bank*, 10 F. (2) 937 (C. C. A.—2), Judge Learned Hand cites and quotes exhaustively from precedents before stating the conclusion of the Court that:

“Judges of coordinate jurisdiction, sitting in the same court and in the same case, should not overrule the decisions of each other.”

In the cited case, it appeared a motion to dismiss a complaint for insufficiency denied by one judge was later sustained when renewed before another judge, and, that such a situation had never occurred previously in any district of the Second Circuit.

Instead of a roll call of federal precedents upon so evident a proposition, appellant refers to the dignified statement of Circuit Justice Miller in *Appleton v. Smith*, 1 Dill. 202, Federal Case No. 498, (1870):

“It would be the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence, and might lead to unseemly struggles to obtain a hearing before one judge in preference to the other.”

(c) Said order is to be admeasured by the merit of the required response, and not by collateral attack.

(d) The contentions presented by the said motions are not substantial.

Beside the law of the case established by the grant of the order by Mr. Justice McGuire, the duty of his successor, Mr. Justice Letts, as Motions Justice, to uphold same is implicit in other important aspects.

First, West v. Hitchcock, 19 App. D. C. 333, 346, holds the District Code provisions as to application for and issue of mandamus require a return or answer either to the preliminary rule to show cause or to the writ instead of a demurrer to the petition, or instead of the motions to vacate or dismiss here substituted for such demurrer. (Cf. *United States ex rel v. McVeigh*, 214 U. S. 124, where a demurrer to the return of respondent raised the issue in the case.)

Second, the appellee contentions that appellant should proceed below by the separate action for mandatory relief, so frequently instituted in this jurisdiction, overlook the nature of the proceeding. In other words, mandatory relief, as auxiliary in the same action, or as original in a separate action, is obtainable only in the District of Columbia District Court.

The ancillary proceeding here invoked represents a power, incident to jurisdiction, conferred upon the court below as well as upon other District Courts of the United States. (March 3, 1901, 31 St. 1199, c. 854, 41; March 3, 1911, 36 St. 1162 c. 231, 289, Jud. Code, Sec. 262, 28 U. S. C. A. 377; 11 D. C. Code, 305, W.W.V.A. as amended, Sec. 19, *supra*.)

On the other hand, the separate or original proceeding, to which appellees, and apparently Mr. Justice Letts, would relegate appellant, is aside from the above existing ancillary power, an original plenary and substantive power reposed exclusively in the Court below, and not possessed by any other federal District Court. It is the "*independent suit, as it is in many states, and in England*", referred to by Judge Taft (*supra*). As decided in *Kendall v. United States*, 12 Pet. 524, 560, such plenary and substantive power in the Court below is the result of the adoption by

Congress of the common law of Maryland as the law of the District. (Cf. *United States ex rel v. Schurz*, 12 Otto (102 U. S.) 378.) The plenary and substantive power so arising is not possessed by the Supreme Court of the United States (*Marbury v. Madison*, 1 Cranch 137) nor by the other District Courts of the United States. (*Knapp v. Lake Shore & M. S. Ry. Co.*, 197 U. S. 536; *Covington & C. Bridge Co. v. Hager*, 203 U. S. 109.)

With the court below possessing both the ancillary and original plenary mandatory powers to enforce its judgment against the United States, any separate action instituted by appellant below to obtain satisfaction of its judgment by exercise of the original power would be properly subject to consolidation with the original law action, and the power exercised would be not the original power sought. It would be the ancillary power arising out of the jurisdiction below to enter and enforce a money judgment against the United States (Cf. *Law vs. United States*, *supra*).

Appellees overlook that the original plenary power of the Court below was necessarily invoked in *Hines, Admr. v. United States*, *supra*, for enforcement by the Court below of a final judgment of another court that had no jurisdiction of the ministerial officers of the United States. (Cf. *Robertson v. Railroad Labor Board*, 268 U. S. 616; *Transcontinental & W. Air v. Farley*, 71 F. (2) 288 (C. C. A.—2), cert. den. 55 S. C. 119).

Summarizing, it is submitted the original issue of the order of October 30, 1943, was an exercise of the ancillary powers of the Court below to enforce its judgment and, therefore, is not an independent action. (*Riggs v. Johnson*, *supra*; *Fuller v. Aylesworth*, *supra*.) This disposes of the appellee contentions that any new or independent action

against the United States, or against its respondent officers, arose from grant of the order, involving any misjoinder of actions or of parties, or affecting the time allowable for answer to the respondent officers. This also dissipates the contentions that issue of the order injected a mandatory action, not consented to by the United States, into an action for insurance benefits, with consequent joinder, improperly, of its officers with the United States, or made the United States a party to the order, or that the United States, or its officers, must be sued in a separate mandatory action.

Conclusion.

As these are all of the contentions presented by the motions to Mr. Justice Letts, and each, upon consideration, is without substance, it follows:

Neither the motion of the United States to dismiss nor the order sustaining same, was properly for consideration, and the order of dismissal should be reversed and vacated herein as to the appellee, United States.

Likewise, the motions of the appellee respondent-officers are without substance, and the orders sustaining same should be reversed, with award of costs to appellant against said respondents. The award of costs is sustained by *United States ex rel. v. Schurz*, 102 U. S. 478.

These disposals, with remand for reinstatement of the alternative order and further proceedings thereon, represent the relief involved in the appeal, unless the Court, by considering the grounds (*supra*) for non-payment of the judgment stated in the supplemental affidavit, and admitted as true by the respondent motions, proceeds to disposition of the basic controversy. In other words, the sub-

stance of the whole controversy, as declared obtainable and desirable in mandatory proceedings for their speedy decision in *West v. Hitchcock*, 19 App. D. C. 333, 364 (*supra*), is here admitted and available for consideration and decision.

Appellant shortly submits that the lack of authority of the Veterans Administrator, or the Comptroller General, except as prescribed in the Act of 1933, to refuse payment of a judgment for proceeds of a yearly renewable term insurance contract is fully settled in *Hines, Admr. v. United States, supra*, and that the advance decision of the Comptroller General directly conflicts with said decision, and, by reason thereof, summarily deprives appellant of its property without due process of law.

Respectfully submitted,

(s) CAMDEN R. McATEE,
1021 Tower Building,
Washington 5, D. C.,
Attorney for Petitioner.

99 12842

ADVICE OF PAYMENT OF SETTLEMENT TO ACCOMPANY CHECK

GENERAL ACCOUNTING OFFICE

Claim No. 0966084WASHINGTON, September 25, 1943
(Date)In correspondence please
refer to above claim No.

CERTIFICATE No.

0749173

Camden R. McAtee,c/o Clerk, District Court of the United
States for the District of Columbia,
Washington, D. C.I have certified that there is due you from the United States, payable from the appropriation (s)
indicated, the sum of—

SEP 23 1943

50914

EIGHT HUNDRED TWENTY-TWO AND 75/100

Dollars (\$ 822.75)

on account of

attorney's fee under judgment rendered on January 9, 1941, an order correcting
judgment rendered April 4, 1940, in the District Court of the United States for the
District of Columbia, in the case of Elizabeth Kerr, as administratrix of the estate
of Joseph Kelly Kerr, deceased, and Elizabeth Kerr, as administratrix of the estate
of Eugene Kerr, deceased, vs. United States of America, Defendant, Law No. 70830.
(Kerr, Joseph Kelly, I-150-407, XC76,422, World War)

3640103 Military and Naval Insurance, Veterans' Administration, 1944 and Prior Years.

Check to issue as above and be transmitted to the clerk, District Court of the
United States for the District of Columbia, Washington, D. C., for delivery to the
payee after collection of costs and fees and entry of satisfaction of that part of
the judgment.

The enclosed Treasury check is in settlement of said claim (s). Lindsay C. Warren

Comptroller General of the United States,

By JOHN G. PALCHO

CLAIMANT'S NOTICE

BEST COPY AVAILABLE

from the original bound volume

JOINT APPENDIX
Appeal No. 8775.

INDEX TO JOINT APPENDIX.

	PAGE
Joint Appendix of Record	1
Docket Entries	2
Motion for Alternative Order of Enforcement of Judgment	3
Affidavit in Support of Plaintiff's Motion for Alternative Order	4
Opposition of United States.....	10
Motion for Amended Alternative Order.....	10
Supplemental Affidavit upon Motion to Amend.....	11
Order upon Motion as Amended and Alternative Order to Officers of the United States.....	13
Motion to Dismiss.....	15
Motion to Vacate	17
Order of Dismissal	18
Order Vacating as to Administrator of Veterans Affairs	19
Order Vacating as to Comptroller General.....	19
Notice of Appeal	20
Statement of Points	21

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA.

No. 8775

CITIZENS LOAN AND TRUST Co., Admr.,
d. b. n., of Estate of JOSEPH KELLY KERR,
Deceased,

Appellant,

v.

THE UNITED STATES OF AMERICA, FRANK T.
HINES, Admr., of Veterans Affairs, LIND-
SAY C. WARREN, Comptroller General of
the United States,

Appellees.

APPEAL FROM ORDERS OF UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX OF RECORD.

INDEX.

	PAGES
Caption	
Docket Entries	1
Motion of plaintiff for alternative order for enforce- ment	11
Affidavit in support of motion	12-18
Objection of defendant United States to motion.....	20
Motion of Plaintiff for amended order.....	21
Supplemental affidavit in support of same.....	22-24
Order upon motion as amended, and	
Alternative Order to United States Officers.....	25-26
Motion to dismiss of defendant United States.....	28-30

Motion to vacate of Administrator of Veterans Affairs (Identical motion by Comptroller General)	31-32
Order of dismissal as to United States.....	33
Order vacating as to Administrator of Veterans Affairs	34
Order vacating as to Comptroller General.....	35
Notice of appeal	36
Statement of points of appellant.....	38-39
Note: There is no testimony in the case. Captions, detailed signatures, etc. are omitted. The filing date is noted under the caption of each paper. Record references are to the page numbers placed at the bottom of the official record pages.	

Docket Entries.

All docket entries prior to orders appealed from, beginning Aug. 10, 1943:

1943	Aug. 10	Motion for Order for enforcement of judgment
		Notice P. & A. & afft.
	" 13	Defendants opps. to motion
	Sept. 1	Memorandum of deft. in opposition to motion
	" 4	Mo. of plaintiff to amend alternative order
	" 4	Supplemental affidavit on motion to amend
	" 4	Deposit for costs by McAtee
	Oct. 30	Order upon motion as amended & alternative order to Officers of U. S. McGuire J. (n)
	Nov. 10	Mo. of defendant U. S. to dismiss & vacate order to show cause. P. & A. <i>Note:</i> Same entries made as to similar motions by C. G. & Hines respectively

- 1944 Jan. 4 Motion of plaintiff to set aside order
P & A & Notice
- “ 12 Deft Opposition to Motion of Plf for re-
hearing
Notice filed
- “ 18 Memo for pltf for reconsideration of rul-
ings of Dec. 22 filed
- “ 18 Order granting motion of defendant
Warren, Comp. Gen., vacating rule to
show cause filed Oct. 30, 1943—Letts, J.
- “ 18 Order granting motion of defendant
Hines vacating rule to show cause filed
October 30, 1943 Letts, J.
Order granting motion to dismiss filed by
U. S. A.—Letts, J.
-

R. 11 Motion for Alternative Order for Enforcement of Judgment.

(Filed August 10, 1943.)

Plaintiff, Citizens Loan & Trust Company, Admr. *de bonis non*, of the Estate of Joseph Kelly Kerr, deceased, by its attorney, moves the Court, for cause shown in the affidavit of Camden R. McAtee, filed in support hereof.

To enter its order herein requiring the defendant United States forthwith to pay and satisfy the certain judgment recovery of the sum of \$8,227.50 awarded on June 30, 1942, and now in full effect.

Or, in the alternative, on or by a day certain, by response to show why said judgment should not be so paid and satisfied;

And further,

To order the Points and Authorities and said affidavit to be made part of the record herein.

**R. 12-18 Affidavit in Support of Plaintiff Motion for
Alternative Order.**

(Filed August 10, 1944.)

For affidavit in support of motion by plaintiff for entry of alternative order herein for enforcement of the certain judgment recovery of \$8,227.50 herein according to its provisions:

CAMDEN R. McATEE, being duly sworn, states:

That he is attorney of record for the original and substituted plaintiffs herein.

That the original plaintiff duly instituted this action, after a disagreement between the parties as to liability, to recover the proceeds of a certain war risk term life insurance contract unpaid upon the death of the designated beneficiary who survived insured, on the ground that said contract was in force and effect at, and was duly matured by the death of insured on November 8, 1919. Issue being made and joined thereon, judgment orders allowing a recovery against the United States, and payable as therein provided, were duly entered as follows:

April 5, 1940, for recovery of \$10,580.

January 9, 1941, reducing said recovery to \$8,227.50.

June 30, 1942, setting aside an appellate reversal of the recovery of \$8,227.50, and affirming and reinstating same, in favor of the substituted plaintiff; such entry being pursuant to mandate of the Supreme Court of the United States, (314 U. S. 200).

The defendant objected to entry of the judgment order of June 30, 1942, and said objections being overruled by summary entry thereof, said defendant renewed said objections by *Motion to Vacate* said judgment filed July 3, 1942, for cause that the case record did not disclose the estate of insured would not escheat, and alleged such disclosure was prerequisite to payment by provisions of Section 303 amended, W.W.V.A., under and by which the liability to be determined, and by *Motion to Stay* its execution, in the alternative, filed September 13, 1942, until or unless plaintiff showed to the satisfaction of the Court, that competent distributees existed to receive said estate as inclusive of the judgment proceeds upon payment thereof.

Said motions upon hearing were duly denied herein by order entered December 7, 1942, and no appeal from same was taken, and thereby said judgment order is duly allowed, is in full effect and is unsatisfied by payment according to its provisions. The Clerk's certificate is annexed as part hereof marked Exhibit A.

For convenience, said judgment orders, said motions and the order denying said motions are set out, so far as is material to the right of recovery awarded the plaintiff, as follows: (Captions omitted.)

Judgment order of April 5, 1940:

“ORDERED, ADJUDGED AND DECREED: That the plaintiff, Elizabeth Kerr, Administratrix of the Estate of Eugene Kerr, deceased do have and recover from the defendant, The United States of America, the sum of \$3,220, representing monthly installments of insurance that have accrued on or since November 8, 1919 to and inclusive of June 8, 1924, in the month of the death of Eugene Kerr,

“And that Elizabeth Kerr, Administratrix of the Estate of Joseph Kelly Kerr, deceased, do have and recover from the defendant The United States of America, the sum of \$10,580, representing monthly installments of insurance that have accrued on or since July 8, 1924 to and inclusive of October 8, 1939, making the aggregate amount of this judgment to be \$13,800, and it is

“Further ORDERED AND ADJUDGED that 10% of each of said recoveries, to-wit, a total of \$1,380.00 be payable to and paid to Camden R. McAtee, attorney of record for said plaintiffs as the attorney fees allowable by law for services herein to said plaintiffs, and in reduction of the amounts payable to said plaintiff.”

Order correcting Judgment Order, entered Jan. 9, 1941:

“* * * FURTHER ORDERED, ADJUDGED AND DECREED: That the judgment for \$10,580 rendered by this court on April 4, 1940, in favor of the plaintiff Elizabeth Kerr, administratrix of the estate of the insured, Joseph Kelly Kerr, be and it is hereby reduced *nunc pro tunc*, to \$8,227.50, which last mentioned amount represents the present value on June 24, 1924, the date of death of the beneficiary of the insurance contract, of the 184 monthly installments of insurance contract benefits of \$57.50 each thereafter payable through October 1939, after deducting therefrom the sum of \$6.50 on account of the unpaid premium on said insurance for November 1919, and that said plaintiff do have and recover from the defendant the said sum of \$8,227.50 as of April 5, 1940, subject to the payment to Camden R. McAtee, attorney of record for said plaintiff, of ten per cent thereof, to-wit \$822.75, for legal services to said plaintiff in this suit, and in reduction of the amount payable to said plaintiff.”

Judgment pursuant to mandate, entered June 30, 1942:

"Pursuant to the mandate of the Supreme Court of the United States duly filed herein on June 12, 1942, which recites the substitution as respondent in and before said Supreme Court of Citizens Loan & Trust Company, Administrator *de bonis non* of the Estate of Joseph Kelly Kerr, Deceased, in the place and stead of the original plaintiff herein, Elizabeth Kerr, Administratrix of said Estate, as the result of suggestion of her interval death, and which severally orders that the case be so continued and maintained by and in the right of said substituted plaintiff, and that the judgment of the United States Court of Appeals for the District of Columbia recited in said mandate be and is reversed, and that the cause be remanded to this Court for reinstatement of its certain judgment by this Court in conformity with the opinion of the said Supreme Court, and this Court being advised, it is this 30th day of June, 1942:

"ORDERED AND ADJUDGED: That the certain judgment of this Court entered on January 9, 1941, for recovery from the defendant, the United States, of \$8,227.50, as of April 5, 1940, by the plaintiff, Elizabeth Kerr, Administratrix as aforesaid, be and the same is reinstated as always in full force and effect and forthwith payable, but subject to the amendment hereby ordered and made that the said recovery be and is payable to the substituted plaintiff, Citizens Loan & Trust Company, Administrator *de bonis non* of the Estate of Joseph Kelly Kerr, deceased, subject to the payment to Camden R. McAtee, plaintiff attorney of record, of 10% thereof, for legal services herein, and in reduction of the amount payable to said substituted plaintiff."

Motion to vacate judgment, filed July 3, 1942:

"Comes now the defendant, The United States of America, by the United States Attorney, and moves the Court to set aside the judgment entered herein on June 30, 1942, with permission to the plaintiff to supply deficiencies in the record fatal to its right to recover or, if such deficiencies are not supplied, the United States Attorney hereby moves that judgment be entered in favor of the defendant.

"The record does not support the judgment because it contains nothing to show that the insurance, if paid, would not escheat and the right of the plaintiff, administrator of the insured's estate, to receive payment is conditioned upon the absence of escheat. Section 303 of the World War Veterans' Act, 38 U. S. C. 514.

"Defendant hereby requests permission to file a brief in support of this motion within ten days."

Alternative motion to stay execution, filed Sept. 13, 1942:

"Comes now the United States of America, defendant in the above named case, by the United States Attorney, and, as an alternative to its motion to vacate the judgment, filed herein on July 3, 1942, and in the event the court should hold that the said motion to vacate the judgment should not be granted, now moves that an order be entered staying execution of the judgment entered on June 30, 1942, in favor of the administrator of the estate of Joseph Kelly Kerr, until it be established to the satisfaction of the court that heirs of Joseph Kelly Kerr exist to whom the proceeds of the judgment, if paid, may legally be distributed by the administrator."

Order denying said motions, entered December 7, 1942:

"A motion by the defendant, the United States of America, having heretofore been made herein and filed

on the 3rd day of July 1942, to vacate the judgment in favor of the plaintiff filed on the 30th day of June 1942, and a motion having been made by the defendant, in the alternative, to stay execution of the judgment, and the said motions having come on to be heard, and the report and recommendations of the Commissioner of Veterans' Cases on the said motions having heretofore been filed, and oral argument on the said motions having been heard, each of the parties hereto being represented by counsel, and the Court being fully advised in the premises, it is,

“ORDERED that the defendant's motion to vacate the judgment herein and the defendant's motion to stay execution thereof be and each of them are hereby denied.”

Affiant states said judgment so in full effect and unsatisfied does not bear interest upon the principal recovery, and its non-payment is depriving plaintiff of property in disregard of the final determination by said judgment of the paramount right thereto; that for the due payment and satisfaction of said judgment appropriated funds are and always have been available; that upon and after the entry of said judgment and merger therein of the liability upon the original obligation by due allowance of recovery thereon as provided in said judgment, the satisfaction thereof is ministerial and not discretionary; that thereby there is no administrative right or authority to review, amend, construe or ignore said judgment or judicial proceedings giving same full effect unless such right or authority is asserted and established by and in additional judicial proceedings, or unless the judgment claimant waives such additional proceedings by admitting and consenting to the exercise of such right or authority; that no such additional judicial pro-

ceedings have been instituted, except the motions to vacate or stay duly denied as aforesaid; that none are pending, and no waiver thereof by any consent or admission of plaintiff has been made or given; that plaintiff and said estate are without property or funds, excepting the proceeds of said judgment, and rely upon and appeal to the jurisdictional powers herein to procure due performance of said judgment order by entry of its order or orders upon the motion of plaintiff therefor.

Affiant says the foregoing statements are true as he verily believes.

R. 20 Opposition of United States.

(Filed August 13, 1943—Served August 12, 1943.)

Comes now the United States of America, defendant in the above named case, by the undersigned attorneys, and says that the motion for an order for enforcement of judgment, filed by the plaintiff on August 10, 1943, should be denied for the following reason:

That the defendant is a sovereign, subject to suit only in accordance with its consent to be sued, and no consent has been granted for a proceeding against it of the character invoked by the plaintiff's motion, or for the entry of an order against it of the character sought.

R. 21 Motion for Amended Alternative Order.

(Filed September 4, 1943.)

Plaintiff by its attorney pursuant to leave asked and granted, moves the Court:

1. To amend its pending motion for entry of alternative order for enforcement of pending unsatisfied judgment against the United States and thereby:

To order Hon. Frank T. Hines, Administrator of Veteran Affairs, and Hon. Lindsay C. Warren, Comptroller General of the United States, in its behalf as its officers authorized to give said judgment the due effect required by law, to give full effect to said judgment by payment and satisfaction according to its provisions, or, alternatively, to show sufficient cause for refusing so to do, and to make response herein on a day certain, and

2. To order the supplemental affidavit of Camden R. McAtee filed in support hereof to be made part of the record.

R. 22-24 Supplemental Affidavit Upon Motion to Amend.

(Filed September 4, 1943.)

For supplemental affidavit in support of motion of plaintiff to amend its pending motion for alternative order against defendant, United States, Camden R. McAtee, being duly sworn, states:

1. That the entry, proceedings thereon, finality, funds, availably appropriated and non-payment of the certain judgment recovery of \$8,227.50 entered on June 30, 1942, and confirmed as in full effect by order entered December 7, 1942, are shown in previous affidavit of affiant filed herein on August 10, 1943, to which reference is made as part hereof.

2. That as affiant is informed and alleges, said judgment was duly certified to Hon. Frank T. Hines, Veterans Administrator, by the Department of Justice for payment and

satisfaction according to law from existing appropriated funds; that thereupon it became and is the statutory duty of said Administrator to submit said judgment to Hon. Lindsay C. Warren, Comptroller General of the United States for determination, in performance of his statutory duty, of indebtedness, if any, of claimant to the United States, however arising, and for offset thereof either by consent of claimant or by institution of further judicial proceedings, and for certification of the amount of the judgment in excess of said offset and estimated costs as forthwith payable by said Administrator, and upon receipt of said determinations, it is the statutory duty of said Administrator to make payment in accordance therewith to claimant of such excess.

3. That the aforesaid Administrator and Comptroller General as the administrative officers of the defendant authorized by law to act for and in its behalf as aforesaid, but that they are not thereby authorized either to reject, review or revise judicial determinations except by duly instituted further judicial proceedings; that the attorney for the defendant, United States, upon the hearing of this pending motion has admitted further proceedings for enforcement of the judgment should be against said officers of the sovereign instead of against the sovereign, and that as no further judicial proceedings have been instituted the judgment is in full effect.

4. That notwithstanding their respective duties prescribed by law as aforesaid, said Administrator is delaying and refusing payment of said judgment by not submitting same for determination and certification, and, instead, by relying upon an advance decision of the Comptroller General regarding its payment that payment thereof is not to be made until or unless plaintiff shall submit convincing

evidence that such payment, if made, would not escheat under the laws of the place of insured's residence at the time of death; that said Comptroller General in making said decision has acted in excess of his powers in that same summarily operates to reject, review and revise the specific ruling and order of this Court that payment of said judgment is not to be stayed until or unless claimant submit convincing evidence of non-escheat of the payable proceeds under the laws of residence of the insured; that the Comptroller General has advised affiant of his said decision and the Administrator has informed affiant of his reliance thereon in refusal of payment; that thereby the final judgment and orders of this Court are denied effect and the property of plaintiff is taken contrary to law.

5. That said Administrator and Comptroller General are within the District of Columbia, and subject to the jurisdiction of this Court, that the inquiry into their feissance or non-feissance as to their aforesaid statutory duties is an inherent power incident to the judgment and its satisfaction, and that said inquiry and response is authorized by F. R. C. P. 71, and affords a just, speedy and inexpensive determination of the propriety of payment of the judgment.

Affiant says the foregoing statements are true as he verily believes.

R. 25-26 Order Upon Motion as Amended and Alternative Order to Officers of the United States.

(Filed August 30, 1943.)

Plaintiff having moved herein for an alternative order against the defendant, the United States of America, to require payment and satisfaction herein of the certain unsatisfied judgment (entered June 30, 1942, and confirmed as

in full effect by order entered December 7, 1942) and defendant by counsel having objected that any such proceeding should be against its authorized officers and not against the sovereign, and thereupon plaintiff having asked and being granted leave to amend its motion, seeks to obtain issue of such alternative order against said officers to require them in behalf of defendant to respond herein, and having filed original and supplemental affidavits in support thereof, and

October

the Court being advised, it is this *30th* day of ~~September~~, 1943:

CONSIDERED AND ORDERED, that said amended motion be, and same is granted, and said original motion be, and it is so amended, and, that Hon. Frank T. Hines, Veterans Administrator, and Hon. Lindsay C. Warren, Comptroller General of the United States, as the officers of the United States of America, in the District of Columbia, authorized to give said judgment the due effect required by law, ~~do in its behalf give same full effect by payment and satisfaction according to law, and to its provisions, or alternatively, do show sufficient cause, if any, for refusal or failure so to do, and do make their responses herein on or before Wednesday, Nov. 10, 1943 at 10 o'clock a. m., or as soon thereafter as the parties may be heard, before Mr. Justice Motions Justice under penalty of the rule being made absolute;~~

Provided: On said hearing day, it shall appear by due return of service, that copies hereof, and of the original and amended motions, and of the original and supplemental affidavits, have been served at least 5 days previously upon the District Attorney, as attorney of record for the defendant, and said officer respondents.

And: That the original and supplemental affidavits of Camden R. McAtee filed herein be, and same are hereby made part of the record.

MATTHEW F. McGUIRE,
Justice.

R. 28 30

Motion to Dismiss.

(Filed November 10, 1943.)

Now comes the defendant, the United States of America, by Edward M. Curran, United States Attorney in and for the District of Columbia, and D. Vance Swann, Attorney, Department of Justice, and moves the Court to dismiss and vacate the order to show cause entered herein on the 30th day of October 1943, and in support of said cause would respectfully show to the Court:

I.

That a final judgment was entered in this cause by this Court on the 30th day of June 1942, and thereafter a certified copy of such judgment was duly transmitted by attorneys for the defendant to the proper agency for disposition according to law.

II.

That the order of the Court entered herein has the effect of injecting a mandatory action based upon a judgment into an insurance suit based upon a contract; that a suit for mandatory relief based upon a judgment for insurance benefits, as in the present case, is properly to be brought only against the officer of the Government charged with the duty of paying the judgment, while the assertion of a claim for insurance benefits based upon an insurance contract is depend-

ent solely upon the provisions of Section 19 of the World War Veterans Act.

III.

The defendant, the United States of America, has not consented to be further sued under Section 19, World War Veterans Act, nor any other act, nor has the defendant, the United States of America, consented to the joinder of the Comptroller General of the United States and the Administrator of Veterans' Affairs by mandatory process, or otherwise, in this action which was brought under the provisions of Section 19, World War Veterans Act, and would respectfully show to the Court that the judgment of this Court in this cause of action has long since become final.

IV.

The order entered herein in effect seeks to join the Comptroller General of the United States and the Administrator of Veterans' Affairs with the United States of America in an action in the nature of a mandamus, which said action is brought under Section 19 of the World War Veterans Act.

V.

That the cause of action of the plaintiff against the Comptroller General of the United States and the Administrator of Veterans' Affairs, if any such he has, may not properly be joined in a suit against the United States but must be maintained in a separate suit against the said Comptroller General and Administrator of Veterans' Affairs. Furthermore, an action in the nature of a mandamus will not lie against the United States of America.

WHEREFORE, defendant prays that the said order entered herein on the 30th day of October 1943 be vacated, and that the plaintiff be prohibited from further harassing and annoying the defendant, the United States of America, in

cause styled Elizabeth Kerr, Administratrix, Citizens Loan & Trust Company, Administrator (Substituted Plaintiff) v. United States of America, Law No. 70830.

R. 31-32

Motion to Vacate.

(Filed November 10, 1943.)

Comes now Frank T. Hines, Administrator of Veterans' Affairs, Veterans Administration, by and through his duly authorized attorneys, and moves the Court to set aside and vacate the order to show cause entered on the 30th day of October, 1943, in the above entitled and numbered cause, and in support of said motion would respectfully show to the Court:

I.

That the order entered herein has the effect of joining the Administrator of Veterans' Affairs and the Comptroller General of the United States with the United States of America in a mandatory action in a suit upon a contract of insurance arising under the provisions of Section 19 of the World War Veterans' Act.

II.

That the joinder of the parties contemplated by the order entered herein constitutes not only a misjoinder of parties, but also an improper joinder of causes of action.

III.

That the plaintiff's right of action against the Administrator of Veterans' Affairs and the Comptroller General of the United States, if any he has, is a separate and distinct one and may not be collaterally asserted in an action against the United States upon a contract of insurance permitted under Section 19 of the World War Veterans' Act.

IV.

That the order entered herein requires this defendant, who is an officer of the United States, to file an answer on the merits within ten days after the entry of such order and is in violation of the Rules of Civil Procedure allowing officers and agencies of the United States sixty days in which to file an answer.

WHEREFORE, defendant prays that the said order to show cause entered herein on the 30th day of October, 1943, be vacated.

Note: Motion to vacate filed by the Comptroller General is identical with the above motion filed by Frank T. Hines, Administrator of Veterans Affairs, except as to name and official capacity. Copies of both motions and of motions of United States to dismiss, together with copy, of points and authorities were mailed to counsel for plaintiff on November 9, 1943.

R. 33

Order of Dismissal.

(Filed January 18, 1944.)

On this 22nd day of December, 1943, came on for consideration the motion to dismiss filed herein by the defendant, United States of America, and, having been advised in the premises, the Court is of the opinion that said motion should be in all things granted.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that plaintiff's action against the United States be, and the same is, hereby dismissed.

Dated this 18th day of January, 1944.

/s/ F. DICKINSON LETTS,
Justice.

R. 34

Order Vacating.

(Filed January 18, 1944.)

On this 22nd day of December, 1943, came on for consideration the motion to vacate rule to show cause filed herein by the defendant, Lindsay C. Warren, Comptroller General of the United States, and, after having been advised in the premises, the Court is of the opinion that said motion should in all things be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the order to show cause entered herein on the 30th day of October, 1943, be, and the same is, hereby vacated. ~~and IT IS FURTHER ORDERED that said cause of action against Lindsay C. Warren, Comptroller General of the United States, be, and the same is, hereby dismissed.~~

Dated this 18th day of January, 1944.

/s/ F. DICKINSON LETTS,
Justice.

R. 34

Order Vacating.

(Filed January 18, 1944.)

On this 22nd day of December, 1943, came on for consideration the motion to vacate rule to show cause filed herein by the defendant, Frank T. Hines, Administrator of Veterans' Affairs, and, after having been advised in the premises, the Court is of the opinion that said motion should in all things be granted.

IT IS, THEREFORE, ORDERED, and DECREED that the order to show cause entered herein on the 30th day of October, 1943, be, and the same is, hereby vacated. ~~and IT IS FURTHER ORDERED that said cause of action~~

against the said Frank T. Hines, Administrator of Veterans' Affairs, be, and the same is, hereby dismissed.

Dated this 18th day of January, 1944.

/s/ F. DICKINSON LETTS,
Justice.

R. 36

Notice of Appeal.

(Filed April 17, 1944.)

Notice is hereby given this 17th day of April, 1944, that plaintiff herein, Citizens Loan and Trust Company, Admr. *d. b. n.*, of the Estate of Joseph Kelly Kerr, deceased, hereby appeals to the United States Court of Appeals for the District of Columbia, from the final orders of this Court entered on the 18th day of January, 1944, in favor of the defendant United States, and its officer-respondents, Lindsey C. Warren, Comptroller General of the United States, and Frank T. Hines, Administrator of Veterans Affairs, Veterans Administration, sustaining the motions of said defendant and respondents therefor, and thereby dismissing and discharging the alternative order entered October 30, 1943, to require said respondents either to pay and satisfy the certain judgment of plaintiff against the United States entered June 30, 1942, and thereafter in full effect and unpaid in the principal sum of \$7,404.75, or on a day certain to show sufficient cause to the contrary.

R. 38-39

Statement of Points.

(Filed April 26, 1944.)

The appellant states the points upon which it intends to rely on the appeal herein are as follows:

1. The Court below erred in considering and granting the motion to dismiss the order of October 30, 1943, filed by defendant, United States of America, and is thereby upholding any of its following contentions, that the United States is a party to said order, or that the order erroneously injects a mandatory action into an action for insurance benefits, or that the United States has not consented to be sued except under Section 19 of the World War Veterans Act, or to any joinder of its officers, or that the order joins its officers with the United States, or that said officers must be sued in a separate mandatory action.

2. The Court below erred in considering and granting the motions to vacate the order of October 30, 1943, filed by the respondents, the Comptroller General and the Veterans Administration, and in thereby upholding any of their following contentions: That the order joins said officers with the United States in a mandatory proceeding in an action arising under Section 19 of the World War Veterans Act; or that thereby misjoinder of parties and causes of action results; or that the right of claimant constitutes a separate and distinct cause of action against said officers; or that said officers are entitled to sixty days in which to answer.

3. The Court below erred in considering and granting the said motions to dismiss and vacate in its refusal thereby to rule:

(a) The order of October 30, 1943, is proper ancillary exercise of the judicial power reposed in jurisdiction of the original action to give its judgment effect.

(b) Said order constitutes the law of the case to be followed, and not revoked by another judge.

(c) Said order is to be admeasured by the merit of the required response and not by collateral attack.

(d) The contentions presented by the said motions are not substantial.

